

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TONY PENWELL,

Plaintiff,

v.

CHERYL STRANGE, et al.,

Defendants.

CASE NO. 3:21-cv-5722 RJB-JRC

ORDER ON REPORT AND  
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge J. Richard Creatura. Dkt. 13. The Court has considered the Report and Recommendation, Plaintiff's Objections to the Magistrate's Report and Recommendation, the Defendants' response to the objections, the Plaintiff's reply and the remaining file.

The Plaintiff filed this case on September 28, 2021 asserting that his Eighth Amendment right to be free from cruel and unusual punishment is being violated by Defendants' decision to force the Plaintiff to be double-celled with another prisoner. Dkt. 1 and 7. He also makes claims under the Fourteenth Amendment. Dkt. 7. This case is related to two other cases filed by two

1 other inmates: *Ejonga-Deogracias v. Strange*, 2:21-cv-01004 RJB-JRC and *Schubert v. Strange*,  
2 2:21-cv-01070 RJB-JRC.

3 The Plaintiff's application to proceed *in forma pauperis* ("IFP") in this case was granted.  
4 Dkt. 6. The Plaintiff filed a Motion for Temporary Restraining Order and Preliminary Injunction  
5 on October 25, 2021. Dkt. 10. The Plaintiff requested that the Court order the Defendants to  
6 cease double-bunking at the facility and cease transporting prisoners to other facilities. *Id.*

7 On October 27, 2021, a Report and Recommendation was issued, recommending that the  
8 Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction be denied. Dkt.  
9 13. It recommends this Court find that the requested relief is too broad, the portion of relief  
10 related to transferring prisoners is not related to the claims in the complaint, and that the Plaintiff  
11 has failed to show a likelihood of success on the merits. *Id.*

12 The Report and Recommendation (Dkt. 13) should be adopted and the Plaintiff's motion  
13 (Dkt. 10) denied. The case should be re-referred to Magistrate Judge Creatura for further  
14 proceedings. The Plaintiff's objections do not provide a basis to reject the Report and  
15 Recommendation. In his objections, the Plaintiff states that in his motion for preliminary  
16 injunction, he only wants to have the Court order that the Defendants stop their plan. Dkt. 20.  
17 The Plaintiff fails to acknowledge that even this relief is too broad, and to some degree, unrelated  
18 to the claims in his complaint. The Plaintiff states that he now seeks to force the Defendants to  
19 implement safe living conditions such as "social distancing, sanitation, . . . sanitizer, . . . testing .  
20 . . and personal protective equipment." Dkt. 20. The Plaintiff's newly articulated relief is  
21 different from that addressed in the Report and Recommendation; it does not alter the analysis  
22 that adoption of the Report and Recommendation is appropriate. The Plaintiff also refers to a  
23 consent decree that has been vacated. Dkt. 20. His contention, that the consent decree proves  
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1 deliberate indifference, is unpersuasive. In any event it does not demonstrate that adoption of the  
2 Report and Recommendation is improper. The Plaintiff's discussion of the difficulty in using the  
3 toilet and COVID-19 testing not taking place also does not change the analysis.

4 The Plaintiff contends that his case is different from the other two cases filed because he  
5 is older and has underlying health conditions, making him more vulnerable to COVID-19. Dkt.  
6 20. He argues that the Magistrate Judge should have asked the Defendants to respond to his  
7 Motion for Temporary Restraining Order and Preliminary Injunction before recommending that  
8 the motion be denied based on the Defendants' responses in the other two cases. *Id.* The  
9 Plaintiff fails to show that this is a basis to reject the Report and Recommendation. He does not  
10 address the core reasons why the Report and Recommendation recommends that his motion be  
11 denied: his requested relief is too broad, the portion of relief related to transferring prisoners is  
12 not related to the claims in the complaint, and that the Plaintiff has failed to show a likelihood of  
13 success on the merits. *Id.*

14 The Plaintiff adds additional allegations, for example about the time it takes to get  
15 laundry back, which are not in the complaint and do not provide a basis to reject the Report and  
16 Recommendation. It should be adopted.

17 It is **ORDERED** that:

18 (1) The Report and Recommendation (Dkt. 13) **IS ADOPTED**;

19 (2) The Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction  
20 (Dkt. 10) **IS DENIED**; and

21 (3) This case **IS RE-REFERRED** to U.S. Judge J. Richard Creatura for further  
22 proceedings.

1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
2 to any party appearing pro se at said party's last known address.

3 Dated this 3<sup>rd</sup> day of January, 2022.

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6 ROBERT J. BRYAN  
7 United States District Judge  
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